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TITLE 312 NATURAL RESOURCES COMMISSION

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## Final Rule

LSA Document #06-605(F)

## DIGEST

Amends [312 IAC 11-5-2](#), which governs lawful nonconforming uses for structures subject to licensure under [IC 14-26-2](#) (commonly known as the "Lakes Preservation Act"), to provide greater specificity to the processes used to evaluate lawful nonconforming uses; to specify that the person claiming a lawful nonconforming use has the burden for establishing conformity; to clarify that the Department of Natural Resources has the burden for establishing that a lawful nonconforming use should be terminated if the department contends it poses a nuisance or has been abandoned; to clarify that a temporary structure can qualify as a lawful nonconforming use; to acknowledge that the seasonal removal of a structure does not constitute abandonment; to provide that a person who wishes to assert the benefits of a lawful nonconforming use for a pier that exceeds 150 feet long (or that exceeds 300 feet on Bass Lake in Starke County) must submit documentation by January 1, 2010; to specify that an abandoned structure is disqualified from treatment as a lawful nonconforming use; and to clarify that the department must issue a complaint or seek emergency relief based upon a contention a lawful nonconforming use must be removed, but the department may serve a notice of violation if an unlawful nonconforming use is placed or maintained or if a lawful nonconforming use is modified or repaired without authorization. Effective January 1, 2008.

[312 IAC 11-5-2](#)SECTION 1. [312 IAC 11-5-2](#) IS AMENDED TO READ AS FOLLOWS:[312 IAC 11-5-2](#) Lawful nonconforming usesAuthority: [IC 14-10-2-4](#); [IC 14-15-7-3](#); [IC 14-26-2-23](#)Affected: [IC 4-21.5-3-5](#); [IC 4-21.5-3-8](#); [IC 4-21.5-4](#); [IC 14-25.5-2](#); [IC 14-26-2-5](#)

Sec. 2. (a) A structure or facility that was lawfully placed before the effective date of a provision of:

(1) [IC 14-26-2](#); or

(2) a section of:

(A) [312 IAC 11-3](#);(B) [312 IAC 11-4](#); or

(C) this rule;

including a structure or facility lawfully placed under a section of [310 IAC 6-2](#) before its repeal, which would be unlawful if placed after that date, is **eligible for qualification under this section as** a lawful nonconforming use.

(b) This subsection governs the establishment of a lawful nonconforming use as follows:

(1) A person who claims a lawful nonconforming use has the burden of proof for establishing:

(A) the existence of the use; and

(B) that the use was lawful;

when the new or amended statutory or rule section became effective. Except as provided in subdivision (2), a use must have been in existence when the new or amended section became effective and not merely at some time before it became effective.

(2) If a rule section that governs the placement of a temporary structure becomes effective outside the boating season, but a temporary structure was used during the previous boating season, the use is considered to have been in existence when the section became effective. As used in this subdivision, the boating season is from April 1 through October 31.

(3) The department may consider the following documentation in determining the existence of a lawful nonconforming use:

(A) Ground level or aerial photographs.

(B) Blueprints or engineering drawings.

(C) Pier installation company records.

(D) Inventories of piers that are nonconforming uses. These inventories shall be maintained by the department's division of law enforcement at the district headquarters for the district in which the structure is located.

(E) CAD drawings.

(F) Deeds, plats, and similar recorded documents.

(G) Adjudications by the commission or by a court, including those determining the intent or consequence of an easement.

(H) GPS units or range finders.

(I) USDA documentation.

(J) County GIS programs and documentation.

(K) Statements from riparian owners and others familiar with the site may also be considered, but a determination may not be based solely on those statements.

(4) Except as provided in subdivision (5), a person may deliver a written request and supporting documentation in support of a claim to any lawful nonconforming use that arises under [IC 14-26-2](#) or this article. Except as provided in subdivision (5), a person who does not deliver a request under this subdivision is not prohibited from asserting the benefits of a lawful nonconforming use as an affirmative defense or otherwise in a proceeding under [IC 4-21.5](#).

(5) A person must satisfy this subdivision in order to retain the status of a lawful nonconforming use for a pier that is longer than one hundred fifty (150) feet (or, for a pier on Bass Lake in Starke County, longer than three hundred (300) feet). By January 1, 2010, the person must deliver, to the department's division of law enforcement at the district headquarters for the district in which the lawful nonconforming use is located, a written request and supporting documentation sufficient to demonstrate the existence of the lawful nonconforming use.

(6) The department shall provide notice under [IC 4-21.5-3-5](#) of a determination that a structure qualifies or does not qualify as a lawful nonconforming use under subdivision (4) or (5).

(7) The department shall maintain a public file or files to memorialize any determinations under this subsection. The department may include in the file a determination that a structure qualified or did not qualify as a lawful nonconforming use even if the determination was made before the effective date of this subsection.

(c) This subsection governs the maintenance of or modification to a lawful nonconforming use as follows:

(1) Except as provided in subdivision (2), a lawful nonconforming use may be maintained, but the use cannot be modified or repaired unless a person satisfies the requirements of [IC 14-26-2](#) and this article that are in effect at the time of the modification or repair. In performing modification or repair under this subdivision, the:

(A) location;

(B) size; and

(C) configuration;

of the use must be maintained.

(2) The department may authorize a modification or repair to a lawful nonconforming use if it determines that the resulting change to the:

(A) location;

(B) size; or

(C) configuration;

would better serve a public right or a vested right, as referenced in [IC 14-26-2-5](#), than does the existing lawful nonconforming use.

(d) This subsection governs the removal of a lawful nonconforming use as follows:

~~(b)~~ (1) The director or the director's designee may order the removal of a lawful nonconforming use under subsection ~~(a)~~ if the structure or facility is either of the following:

~~(4)~~ (A) A nuisance that adversely affects any of the following:

~~(A)~~ (i) Public safety.

~~(B)~~ (ii) Natural resources.

~~(C)~~ (iii) Natural scenic beauty. or

~~(D)~~ (iv) The water level of a public freshwater lake.

(B) Abandoned.

~~(2)~~ (C) Modified in a manner for which a license is required under [IC 14-26-2](#) or this rule, but for which no license has been obtained.

(2) The department has the burden of proof to establish a lawful nonconforming use should be removed under this subsection.

(3) A structure adversely affects public safety under subdivision (1)(A)(i) if the structure is any of the following:

(A) Except as provided in clause (B), extended or located more than one hundred fifty (150) feet lakeward from the shoreline or water line.

(B) For Bass Lake in Starke County, would violate [312 IAC 5-6-3\(a\)](#).

(C) Submerged or otherwise obscured from the view of a boater or other person using a lake.

(D) In a derelict condition. A structure is in a derelict condition if:

(i) so neglected by the owner that it has become ineffective for the intended purposes; or

(ii) following a reasonable inquiry, the owner of the structure cannot be identified.

(4) Generally, a use is abandoned if not exercised for a period in excess of one (1) year. A person may, however, present evidence of special factors that would reasonably excuse a failure to maintain the use. These factors include the following:

(A) Pending litigation relating to the lawful nonconforming use.

(B) Unusual environmental conditions.

~~(e)~~ **(e) [IC 4-21.5-3-8](#) controls** an order issued under subsection ~~(b)~~ is controlled by ~~[IC 4-21.5-3-8](#)~~ **(d)** unless an emergency exists, in which event [IC 4-21.5-4](#) may be applied. **applies.**

**(f) Notwithstanding subsection (e), the department's division of law enforcement or the department's division of water may issue a notice of violation under [IC 14-25.5-2](#) for either of the following:**

**(1) The placement or maintenance of an unlawful nonconforming use.**

**(2) The unauthorized modification or repair of a lawful nonconforming use.**

~~(d)~~ **(g)** Nothing in this rule affects the department's right to seek injunctive or other relief under [IC 14-26](#) or another applicable law.

*(Natural Resources Commission; [312 IAC 11-5-2](#); filed Feb 26, 1999, 5:49 p.m.: 22 IR 2228; filed May 11, 2004, 9:00 a.m.: 27 IR 3065; readopted filed Aug 4, 2005, 6:00 p.m.: 28 IR 3661; filed Sep 6, 2007, 12:09 p.m.: [20071003-IR-312060605FRA](#), eff Jan 1, 2008)*

SECTION 2. SECTION 1 of this document takes effect January 1, 2008.

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